



WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Senate

(Assembly, Senate or Joint)

Committee on Environment...

COMMITTEE NOTICES ...

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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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State of Wisconsin
Department of Natural Resources

**NOTICE TO PRESIDING OFFICERS
OF PROPOSED RULEMAKING**

Pursuant to s. 227.19, Stats., notice is hereby given that final draft rules are being submitted to the presiding officer of each house of the legislature. The rule being submitted is:

Board Order Number: WT-28-04

Clearinghouse Number: 05-058

Subject of Rules: Wisconsin's Shoreland Management Program – NR 115

Date of Transmittal: July 22, 2009

Send a copy of any correspondence or notices pertaining to the rule to:

Edwina Kavanaugh
DNR Bureau of Legal Services
LS/8, 101 South Webster

Watershed Rules Coordinator, Julia Riley
DNR Bureau of Watershed Management
WT/3, 101 South Webster

An electronic copy of the proposed rule submittal may be obtained by contacting Gregg Breese at Gregory.Breese@wisconsin.gov or 608-261-6430

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REPORT TO LEGISLATURE

Revisions to NR 115, Wis. Adm. Code Wisconsin's Shoreland Protection Program

Board Order No. WT-28-04
Clearinghouse Rule No. 05-058

Basis and Purpose of the Proposed Rule

Wisconsin's minimum shoreland zoning standards (NR 115) were originally written in the 1960's and have been revised very little since that time. Development patterns have changed significantly from a small, older family cottage to year round homes and multi-unit complexes with sizes proportionate to the high value of the shoreline property. Since the initial writing, most counties have elected to create ordinances that go beyond the minimum standards but are looking for up-to-date statewide minimums to make these protective measures more consistent. In the years that shoreland zoning has been in place, extensive scientific research has shown that easily-implementable up-to-date minimum standards are critical to protecting Wisconsin lakes and streams.

Revisions to the minimum shoreland zoning standards have been under discussion since 1988. Local evaluations twenty years after adoption were corroborated by a formal comprehensive study in 1997 that found that the minimum standards in the code were difficult to understand and were not being implemented in a manner to protect fish and wildlife habitat, natural scenic beauty and water quality. Many of the basic standards were unchanged since originally adopted nearly 40 years ago. An extensive review of modern scientific literature about fish and wildlife habitat requirements, prevention and control of water pollution, and preservation of shore cover for natural scenic beauty, concluded that to meet the statutory objectives of the program, improved minimum standards were needed for shoreland ordinances.¹

In addition, counties across the state had expressed frustration with the current minimum standards. Counties with existing standards sought more clarity and definition in the rules to enable consistent application across the state resulting in better lake and stream protection. They also sought more flexibility in the code so they could adopt more innovative regulatory programs. Some property owners also expressed frustration with the current minimum standards, including a perceived inequity in the application of the "50% rule" in regulating nonconforming structures and, in certain situations, frustration with the code's reliance on variances as the primary relief mechanism.

The current proposal is a simplified code that recognizes the science of shoreland protection, the value of waterfront property, the past work that counties have put into creating and enforcing shoreland zoning ordinances, the desire for flexibility in development coupled with the demand that the current levels of protection not be reduced.

The proposal follows some key basic principles:

- Property owners may maintain existing buildings and lawns.
- For new building, reconstruction or expansion, property owners will need to either save some space for fish and wildlife habitat and runoff absorption - or restore habitat or runoff absorption - in proportion to the project.

Many familiar standards are unchanged, including the 75 foot setback and the 10,000 and 20,000 square foot lot sizes.

¹ Bernthal, T. October 1997. Effectiveness of Shoreland Zoning Standards to Meet Statutory Objectives: A Literature Review with Policy Implications. Wisconsin Department of Natural Resources.

Construction that pre-dates shoreland zoning and doesn't meet the standards (non-conforming structures) has been problematic because of administrative complexity and inconsistent treatment from county to county. The majority of variance applications are related to modifying existing nonconforming structures and lots. In order to reduce the frequency of variance requests from the same zoning provisions experts recommend modification of the provisions. In addition to removing limits on remodeling or repair within the building envelope, several options are created for expansion.

Many local governments, lake and river groups, and landscapers, as well as state agencies, now use and recommend modern water quality and habitat management practices to landowners that are not reflected in the old shoreland standards. As an example, the old standards do not reflect the need to control invasive species – a need was largely unknown at the time of original adoption.

DNR has developed a comprehensive approach to shoreland management, of which regulation is one element. DNR property managers evaluate the condition of shoreland habitat on state lands and as needed restore shoreline features at several properties each year. Educational materials and programs, including sites demonstrating sound shoreland practices, are widely available through DNR, UW-Extension, county offices, and local lake and river groups. \$775,000 is available annually in lake and river grants specifically to support local governments and organizations with education and incentive programs.

Summary of Public Comments

An extensive public participation process was used in the development of NR 115 rule revisions to update current shoreland protection standards. In addition to convening a long-standing Citizens Advisory Committee, the Department held statewide public listening sessions in 2003, as well as two series of public hearings in 2005 and 2007 on proposed rule changes. Several tens of thousands of comments were received at the public hearings. The current version of the rule change balances the wide range of the public comments.

Major provisions of the proposal include adding definitions to the rule for clarity; providing exemptions for certain activities from shoreland setback and establishing impervious surface and mitigation standards that alter the regulation of nonconforming structures. These changes will significantly decrease the number of variance applications counties receive and allow landowners to undertake certain activities by obtaining a simple administrative permit from the county.

General categories of comments and number of respondents from 2007 public comments are listed in the chart below. More detailed summaries of public comments and the Department's responses are found in Attachment 1 – 2007 Public Comment Summary and Attachment 2 – 2005 Public Comment Summary. Many of the issues addressed in the 2007 public hearing draft were in response to the 2005 comments. The detailed analyses of the 2007 comments and Department responses have informed the final rule revisions drafted by the Department and approved by the Natural Resources Board in June 2009.

NR 115 Issue	Neutral	In Favor	Too Permissive	Support and Oppose	Opposed
General	7	231	18	306	1250
Definitions	4	1	1		98
Shoreland-wetland	5	0	4		5
Land Division	1	0	40		8
Lot Sizes	2	125	38		229
Setbacks	8	97	149		171
Height	8	86	17		206
Buffers	39	137	72		339
Impervious Surfaces	9	292	122	77	468

Mitigation	1	94	7		167
Land Disturbance	3	78	9		67
Administrative- Enforcement	88	1	142		25
Miscellaneous	6	296	295		2027
Comments outside the scope of NR 115	9	0	4		858
Total by category	111	1438	918	383	5923
Total Comments*	8945				

**Includes 132 undecided and 40 language modification comments.*

There will always be some controversy associated with shoreland zoning. The controversy seems to stem from the property rights movement and the overall general dissatisfaction with zoning as a regulatory tool. The rule will probably never be able to satisfy everyone. However, the revision is a major step in the right direction, clarifying several gray areas, using common sense and concepts that will work in the "real world," allowing local innovation to continue and balancing the protection of water quality, wildlife habitat and natural scenic beauty with the needs and wants of today's riparian owners.

Specific to ch. NR 115 and the rule revision process, there will continue to be some controversy surrounding components of the rule such as shoreland vegetation and the new requirements for impervious surface standards and mitigation. Most of the uneasiness is derived from the fact that the concepts are new to shoreland zoning. The new standards can work and have worked in counties around the state; however, here they are required as minimum standards for all counties.

Throughout the public hearing process, the Department listened and made strides to produce the best rule possible to balance the statutory goals of the program with the understanding that private citizens need to have a certain degree of latitude when developing waterfront properties. Shoreland management is a balancing act, attempting to protect our navigable water resources while respecting the rights of individual landowners.

Modifications Made

The Department has drafted the attached revision to ch. NR 115 to meet the statutory objectives of the shoreland protection program while providing certainty and flexibility to counties and property owners.

Highlights of substantive changes are summarized below:

Section NR 115.02 - Applicability

- Explicitly states applicability of rule to unincorporated areas annexed after 1982 and unincorporated areas incorporated after 1994.

Section NR 115.03 - Definitions

- Added definitions for "Access and viewing corridor", "Building envelope", "Existing development pattern", "Impervious surface", "Mitigation" and "Routine maintenance of vegetation".

Section NR 115.04 – Shoreland-Wetland mapping and minimum standards

- Language updated to reflect fact that after 1985 all preliminary Wisconsin Wetland Inventory maps had been adopted. Language now refers to the wetland map "amendment" process.
- Added timeframe for zoning wetlands as reflected in amended maps and zoning districts.
- Added provision to resolve discrepancies in map and field conditions.

- Amended "Rezoning shoreland-wetland districts" language to clarify communication between the counties, Department and Army Corps of Engineers.

Section NR 115.05 - Establishment of Shoreland Zoning Standards

Minimum lot sizes

- Counties may allow development on a substandard lot if the lot is a legal lot of record that complied with the applicable lot size requirements in effect at the time the lot was recorded at the county register of deeds office and the proposed construction of a structure will comply with all other standards in the code.
- Counties may also allow development on substandard lots that don't meet the area and width standards, as long as they were not legally combined, don't have a structure straddling a shared lot line, and can be built in compliance with all other shoreland ordinance standards.

Building setbacks

- The standard minimum setback remains 75 feet.
- Language is added to address structures exempted by other state or federal laws from the minimum setback standards.
- The construction of new dry boathouses is still exempted; however, a provision has been added that boathouses must be located within the access and viewing corridor, not provide human habitation nor contain plumbing.
- New "Existing development pattern" and "Access and viewing corridor" definitions support this standard.

Vegetation

- Routine maintenance of vegetation permitted in shoreland zone. Removal of trees and shrubs also is allowed if the trees and shrubs are exotic or invasive species, diseased or damaged, or an imminent safety hazard, but the removed trees and shrubs must be replaced.
- Language governing management of shoreland vegetation in at least the first 35 feet from the OHWM is clarified, resulting in a more functional buffer protecting habitat and water quality.
- Other vegetation management permitted in the vegetated buffer zone with a county approved plan that requires erosion control; re-vegetation; maintenance and monitoring and enforceable restrictions.
- An access and viewing corridor that is up to 30% of the shoreline frontage is permitted in the vegetative buffer zone; however, a maximum corridor width of 200 feet per riparian lot or parcel has been added and a rule that new boathouses must be located in the corridor.
- New "Routine maintenance of vegetation" and "Access and viewing corridor" definitions support this standard.

Impervious surfaces

- To allow space for fish and wildlife habitat and water quality protection measures, counties must create standards that regulate the total percentage of impervious surface (IS) cover on lots in the shoreland zone.
- The total impervious surface coverage allowance is 15%, but may be exceeded up to a maximum of 30% total if mitigation measures are implemented and maintained.
- Routine maintenance of all existing impervious surfaces may be allowed.
- Lots with more than 30% cover may not add more impervious surfaces if the addition increases the total area of impervious surface. The rules for impervious surfaces and nonconforming principal structures may allow some impervious surfaces on such lots to be expanded or relocated if other impervious surfaces are removed or reduced in area so that the net effect is no increase in impervious surface.
- New "Impervious surface" and "Mitigation" definitions support this standard.

Height

- A new provision limiting structure height to 35-feet high within 75 feet of the ordinary high-water mark is added to protect and preserve the natural scenic beauty close to the shoreline.

Nonconforming structures and uses

- Removed rule that discussed limiting the cost of changes to nonconforming structures to 50%; rule provides incentives to address nonconforming structures via limits on impervious surface area and mitigation requirements.
- Allows continuation of lawful use and routine maintenance of nonconforming structures.
- Added provision allowing expansion of nonconforming principal structures within 75 feet of the ordinary high-water mark with a county permit, provided key requirements are met, including mitigation to offset impacts in most cases.
- Added provision allowing relocation of nonconforming principal structures within 75 feet of the ordinary high-water mark with a county permit, only when no compliant building location exists, and provided key requirements are met, including mitigation to offset impacts and removal of non-exempt structures within 75-feet of the water.
- New "Mitigation" and "Building envelope" definitions support this standard.

Adoption of Administrative and Enforcement Provisions

- In addition to notifying the Regional office prior to any hearings on the following, counties must also submit to the Department within 10 days permits to relocate or expand nonconforming principal structures; variances, special exception and conditional use permits; appeals for map or text interpretations, and decisions to amend map or text ordinances.

Section NR 115.06 (2) - Departmental Duties

- Provision added that after review and upon determining that the county shoreland ordinance and all of its amendments complies with s. 59.692, Stats., the Department shall issue a certificate of compliance to that effect.
- Counties with a non-compliant or no shoreland ordinance have 180 days to work with Department to draft a compliant shoreland ordinance.

Appearances at the Public Hearings

Eight public hearings were held around the state between July 24 and August 15, 2007. A total of 727 individuals gave written or oral testimony at the hearings, although more people were in attendance. The table below shows the attendance at each hearing location. A detailed list of all persons who appeared at the hearings is found in Attachment 3. In addition to those collected at the hearings, more than 8900 additional individual comments were submitted by more than 2400 individuals during the 2007 public comment period. Comments were accepted until September 7, 2007.

Location	Attendance	Appearance Slips	Speakers
Pewaukee	107	101	54
Stoughton	101	98	61
Oshkosh	197	197	139
Wausau	57	51	22
Rhineland	66	66	32
Rice Lake	67	67	38
Tomah	13	13	6
Green Bay	54	54	36
Total	734	647	388

Changes to Rule Analysis and Fiscal Estimate

Minor modifications were made to the 2007 rule analysis and fiscal estimate to reflect the modifications made as a result of public comments.

Response to Legislative Council Rules Clearinghouse Report

All Clearinghouse comments that have not become moot have been accepted and the rule has been revised accordingly.

Final Regulatory Flexibility Analysis

This rule requires counties to adopt shoreland zoning ordinances. County shoreland zoning ordinances must meet or exceed the minimum standards established by the rule. Any businesses in the shoreland zone have been complying with regulations since the late 1960's. This rule revision does not have a significant economic impact on a substantial number of small businesses so the small business analysis is not required.

Attachments

- Attachment 1 – 2007 Public Comment Summary and Response
- Attachment 2 – 2005 Public Comment Summary and Response
- Attachment 3 – Appearances at the 2007 Public Hearings

ATTACHMENT 1

RESPONSE TO 2007 PUBLIC COMMENTS Proposed Revisions to NR 115, Wisconsin Administrative Code Statewide Minimum Shoreland Zoning Standards

Hearing Summary Report

In 2007, the Natural Resources Board authorized public hearings on the proposed revision of the Shoreland Protection Program (Wis Admn Code, ch. NR 115). This document is a summary of the approximately 8,945 comments from 2,381 individuals which were received by the Wisconsin Department of Natural Resources during the public comment period. This summary does not contain each individual comment received. For information from the complete comment database please contact Gregg Breese at Gregory.breese@wisconsin.gov or (608) 261-6430.

Eight public hearings were held during summer 2007 in Wausau (July 24), Rhinelander (July 25), Rice Lake (July 26), Tomah (July 31), Green Bay (August 2), Pewaukee (August 7), Stoughton (August 8), and Oshkosh (August 15). A total of 727 individuals gave oral testimony or submitted written comments at the hearings, although more people were in attendance than submitted comments. In addition to those collected at the hearings 1,654 additional individual comments were submitted and recorded during the public comment period. Comments were accepted until September 7, 2007 and were used in part to inform the current proposal.

Comments were received from the following organizations or individual representatives: DNR Forestry, Remediation-Redevelopment and Natural Resources Board; Wisconsin Department of Justice; State legislators; U.S. National Park Service; university personnel; counties including planning/zoning and land/water conservation departments; municipalities; and land trusts. Representatives from the following industries commented: campground and resort owners; banking and finance; realty; construction; plumbing; pile driving; legal services; landscaping; engineering; and print media. The following special interest groups also commented: Wisconsin County Code Administrators; numerous lakes associations; builders and realtors associations; and environmental advocacy groups.

Comment Overview

Comments ranged from general support or opposition to specific feedback on various sections of the rule. The impervious surface section received the most detailed comments that ranged from supporting the rule (292 comments) to finding it too restrictive (468) or too permissive (122). Vegetation and buffer provisions received the second most detailed comments that ranged from supporting the rule (137) to finding it too restrictive (339) or too permissive (72). The following sections received comments in descending order of frequency: setback, lot size, height, mitigation, administrative-enforcement, land disturbing activities, definitions, applicability, land division and shoreland-wetland.

The majority of comments received concerned miscellaneous issues (207 too restrictive, 296 supporting, and 295 too permissive) but did not refer to specific code sections. Comments raised a range of issues, such as concern that the rules are one-size-fits-all; support for revising the inflexible rules; concerns about implementation costs for property owners and counties; and feeling that short-term financial restraints should not override long-term environmental, social, economic benefits. Many of these issues are addressed in the code.

A number of people (871) commented on issues related to shoreland management, but outside the scope of Departmental authority. The biggest concern was that the law does not apply to all development in incorporated areas of the state. Only the State Legislature is empowered to change this through legislation. Concern was also expressed over agricultural runoff impacts on water. The State has separate regulations that address the distinct impacts from shoreland development and agricultural runoff.

Key

Purpose of section: Why included in code

Current provision: Existing NR 115 code

Proposed provision: 2007 Public hearing proposed language

Public comment: Summary of comments on provision

Response: Response to 2007 comments, reason for change and decision as reflected in proposed rule revision for which final approval is being sought

Title

Purpose of section: To allow quick comprehension of information contained in the code.

Public Comment: This change was not addressed in the previous public hearing process.

Response: "Shoreland Management Program" indicates a proactive role by the regulating agency, whereas "Shoreland Protection Program" explains the purpose of the rule. Title changed.

Purpose

Purpose of section: Describe supporting statutes and public trust reasons for the code.

Public Comment: This change was not addressed in the previous public hearing process.

Response: The changes here are for clarification purposes. No change in substance.

Applicability

Purpose of section: This section provides a consolidated reiteration of various sections of the statutes requiring shoreland zoning for specific geographic areas, including statutory provisions adopted since enactment of the original rule.

Current Provision: The provisions of this chapter apply to county regulation of development in unincorporated shoreland areas. Unless specifically exempted by law, all cities, villages, towns, counties and, when s. 13.48 (13), Stats., applies, state agencies are required to comply with, and obtain all necessary permits under, local shoreland ordinances. The construction, reconstruction, maintenance and repair of state highway and bridges, carried out under the direction and supervision of the Wisconsin Department of Transportation are not subject to local shoreland zoning ordinances, if s. 30.2022(1), Stats. applies.

History: Cr Register, July, 1980, No. 295, eff. 8-80; am. Register, October, 1980, No. 298, eff. 11-1-80; **correction made under s. 13.93(2m)(b)7., Stats.**

Proposed Provision: "The provisions of this chapter are applicable to county regulation of the use and development of unincorporated shoreland areas, and to county, city or village regulation of previously unincorporated shoreland areas that were annexed by a city or village after May 7, 1982 or incorporated as a city or village after April 30, 1994. References in this chapter to a county, or county government agencies, shall be read to apply to cities and villages, or city and village agencies, when this chapter is applied to annexed or incorporated areas in situations where s. 59.692 (7), Stats., requires that shoreland zoning is to continue in effect."

Public Comment: Two themes are raised:

- Revised NR 115 should apply to the entire state regardless of municipal boundaries
- As worded, revised NR 115 will retroactively apply to all areas annexed after 1982.

Response: Revert to existing code language in addition to modifying the rule language to further clarify. The intent of the revision language is to provide a consolidated statement of the statutory requirements for the geographic areas subject to shoreland zoning. Areas of cities and villages within the municipal boundary before May 7, 1982 are not, and are not proposed to be, required to have shoreland zoning. The statute requires cities and villages to apply the county shoreland provisions in effect at the time of annexation to areas annexed after May 7, 1982 and areas incorporated since April 30, 1994. While a clarification was added for rule applicability in annexed and incorporated areas after specific dates, it is

beyond the scope of the Department's authority to require local governments to adopt shoreland zoning in areas not required by the legislature.

Definitions

Purpose of section: Define words used in the rule. This section does not set standards. We strive to reinforce common dictionary usage and to be consistent with other law and rules wherever possible.

Public Comment

(1) Access and viewing corridor:

- Clarify that structures providing access to the water (i.e. walkways, steps) are permitted and don't require that the corridor be completely vegetated.
- Remove term "pedestrian" to avoid confusion over public access

Response: Keep the word vegetated in place because many counties currently limit the size of structures that provide access and the remainder of the viewing and access corridor should be vegetated.

Public Comment

(2) Accessory structure:

- Delete: In code, terms "structure" and "impervious surface" are used to refer to accessory structures but the term is never used
- Term should include existing boathouses, deer stands, duck blinds

Response: The code applies to structures that are accessory, including those mentioned by commenters, but does not treat them differently, so no definition is needed. To add a definition or examples adds complexity and risks additional confusion. References to accessory structure in the remainder of the code were not included so neither was the definition.

Public Comment

(3) Best management practices:

- Refer to as "technical standards"

Response: To simplify the proposed code changes, this definition is not included. BMP's and technical standards have many references in other DNR regulations and have not been shown to have contradictory meanings.

Proposed Addition, not part of the public hearing process

(3) "Building envelope" means the three-dimensional space within which a structure is built on a lot.

Response: To protect future buyers, the definition will help ensure that adequate space is available on newly divided lots for conforming building envelopes. The dimensional space required for such structures needed to be defined and is included in the code.

Public Comment

(5) Compliant building location:

- Clarify "30 foot deep"
- 30 feet deep too small for modern construction or a high value home

Response: Compliant building location as used in the proposal confirms with the generally accepted meaning and does not need specific definition so was removed. However, there was a need to explain the physical space where a building may be constructed. "Building envelope" definition was added to spatially describe building location.

Public Comment

(6) Conditional use or special exception

- Separate these terms
- Define but delete when or how they are issued

Response: Because general zoning law applies a generally accepted meaning to the phrase, the definition was not included in the code.

Proposed Addition, not part of the public hearing process

(7) "Existing development pattern" means a pattern of principle structures that exists within a certain distance of a proposed structure. There must be a principle structure in both directions.

Response: Setback averaging is very loosely defined in the existing code and there have been numerous interpretations by different counties. Comments on the "Minimum setback" section indicated support for the setback averaging process and support for its clarification. The proposed rule sets some parameters for when to use the standard but explaining what the term meant was best placed in the definition section. Definition added.

Public Comment

(8) Expansion:

- Revise to state "addition of impervious surface"
- Clarify. Change "larger, taller, or both" to "an addition to an existing structure that increases the footprint of the building, or both"
- Concern that roofline alteration/pitch-change would fall under expansion and trigger mitigation while not necessarily adding to net usable/livable space

Response: The regulations applicable to expansion, i.e. for nonconforming structures, are specifically defined within the code where applicable. Any currently accepted definition of expansion can be used. Definition not included.

Public Comment

(9) Impervious surface

- Given important nature of this term, the phrase "a large portion" needs further definition.
- Concern with inclusion of driveways (should consider different soils) and decks

Response: No change to definition. Definition the is same as used in NR 151, with the phrase, "unless specifically designed, constructed, and maintained to be pervious" added.. Use of new technology such as pervious concrete, etc. is encouraged as mitigation to help reduce run off and encourage infiltration and the applicant should be credited for this use. Definition added.

Public Comment

(10) Lift

- State specific type of lift: for humans or boats or no difference

Response: Lifts are already allowed to provide safe pedestrian access to the water in NR 115.13(4). Definition not included.

Public Comment

(11) Lot

- Do not tie term to specific form of access. Current term excludes island lots
- "Note": may conflict with findings

Response: Continue to allow each county to define "lot" as has been past practice. Definition not included.

Public Comment

(12) "Mitigation"

- Explain term more clearly.

Response: The Department tried to rely in county staff's knowledge of local soils, etc. to encourage a broad definition of mitigation that would work for each county. This is a new requirement in the code so some baseline definition is needed. Definition added.

Public Comment

(13) Ordinary High Water Mark:

- OHWM should be set by the DNR, not the counties, as it's a significant factor in establishing criteria for this code.

Response: It is beyond the scope of the rule to specify. In many cases OHWM is obvious and it would be administratively burdensome for the DNR to make each OHWM determination. DNR consults with trained county staff on difficult cases. No change to existing definition.

Public Comment

(14) Primary shoreland buffer:

- "Vegetated buffer strip" language does not convey allowance of access/viewing corridor structures.

Response: Did not include any reference to "primary shoreland buffer" in proposal and instead used "35' from the OHWM" where necessary. Definition not included.

Public Comment

(15) Routine Maintenance

- Defining this term is needed since the definition used in air management NR 405.2 would not have the same consequence if allowed to be applied to this code.

Response: Definition not included.

Proposed Addition, not part of the public hearing process

"Routine Maintenance of vegetation" means normally accepted horticultural or forestry practices that do not result in the loss of any layer of existing vegetation and do not require earth disturbance.

Response: Definition of this term needed to distinguish between common routine maintenance of structures and of vegetation, as used in the vegetation standards section. Definition added.

Public Comment

(16) Secondary shoreland buffer:

- Inclusion of this term is extraneous as it is essentially turf grass. More language but does not contribute resource protective measures to the code.

Response: No change. Because the choice exists not to vegetate and invasive plants are a risk, the standard is needed along with the definition.

Current version: No references to secondary shoreland buffer included in proposal. Definition not included.

Public Comment

(17) Structure:

- Definition overly broad. Consider whether term includes both primary (principal) and accessory structures
- Boathouses "temporarily placed on the ground" dredges up the same controversy faced on the St. Croix and Mississippi Rivers

Response: Proposed setback section includes a specific list of structures exempt from the 75' setback, so that we can rely on the currently used definition of structure that counties have been utilizing. Definition not included.

Public Comment

(18) Variance:

- Decide whether to include "use" variances.
- Definition should not limit the code to "dimensional" variances. Delete "dimensional" so both use and dimensional variances are an option.

Response: There are no limiting uses in this code so the issue of a use variance is moot. This definition has been in the code since implementation and in the proposal it remains unchanged.

Public Comment

Suggested definition additions:

- Lake
- Structural alteration: only limited to changes that increase impervious surface
- Maintenance and repair: any change made to a structure that does not constitute expansion
- Height: concern that if not defined, an increase in roof pitch could fall under "Expansion" or "Structural alteration"
- Planned development districts

Response: Lake is a term in common use not requiring definition for purposes of this code. Suggestions for the other definitions relate to standards rather than definition. Definitions not included.

Shoreland Wetlands

Response: Change title of section to "Shoreland-Wetland mapping and minimum standards" to more accurately reflect the content of the section.

Purpose of section: Ensures that counties designate all shorelands in the county identified as wetlands on the Wisconsin wetland inventory maps or Wisconsin wetland inventory map amendments as "shoreland-wetland zoning districts".

Current Provision: Includes provisions for the adoption of shoreland wetland maps, permitted and prohibited uses, along with re-zoning criteria and processes.

Proposed Provision: Deletes the provisions for the adoption of the shoreland wetland maps and includes the remainder of the original language with a noted change to the standard for re-zoning shoreland wetlands. The proposed change states "...there is a practicable alternative or if..." There are also modern terminology drafting changes that refer to the correct offices.

Public Comment:

- Several comments were received with respect to the proposed change in the standards for re-zoning questioning the need for the change.
- Comments were also made requesting an opportunity to challenge the Wisconsin wetland maps.

Responses:

- Counties are enabled by statute to apply general zoning, so language stating "other types of districts (such as general purpose, agricultural, industrial, commercial, residential, recreational, conservancy, or wetlands districts) may be created in addition to shoreland-wetland zoning districts" is removed from the code.
- Counties have already adopted the first version of the WWI and DNR is working on updating the maps. Section 115.04(2)(a) is changed to apply to DNR "amendments" of WWI maps.
- Note added to maintain consistency with ch. NR 116, the Floodplain zoning code, and allow regulators to base permit decisions on actual field conditions rather than relying on maps which can never be a completely accurate boundary determination. Note also clarifies the regulation of actual wetlands from the rezoning process which is required to convert a wetland to an upland area. The note should also make it easier to contest map errors and for counties to regulate wetlands based on field conditions in a timely manner. Added note to 115.04(2)(b).
- Additional language needed to clarify that a rezone is a request to convert a wetland to upland, or to use it for a non-permitted use. Added language to NR 115.04(2)(e).

Section Title

Proposed Addition, not part of the public hearing process

Response: Title should more accurately reflect content of section. Change title of section to "Establishment of Zoning Standards".

Lot Size

Purpose of section: Provide a minimum amount of area to preserve space for infiltrating runoff, for fish and wildlife habitat, and some natural scenic features.

Current Provision: 20,000 square feet and 100 feet wide for unsewered lots; 10,000 square feet and 65 feet wide for sewerage lots.

Proposed Provision: 20,000 square feet and 100 feet wide at OHWM and setback for all newly created lots.

Public Comments:

- Requiring minimum lot width at OHWM and setback line precludes development of many irregular lots – use only lot width at OHWM
- Don't increase lot size as density is good – more infrastructure, unaffordable waterfront
- Increase lot size – Increase lot size and width to meet habitat and natural scenic beauty objective
- Require combining of substandard lots in common ownership

Responses:

- No change to existing lot areas and widths. Maintain different sizes for sewer and unsewered lots.
- Many lakeshore lots were created before NR 115 was written and are non-conforming. This change allows some development of these lots without variances, but still requires compliance with impervious surface standards, etc. Combination of substandard lots in common ownership will not be required; however, provisions are now included that address how adjacent commonly owned lots smaller than the revised lot size requirements may retain their substandard status.

Minimum Setback

Purpose of section: Provide a minimum space between the water and structures for infiltrating runoff, for fish and wildlife habitat, and for some natural scenic features.

Current Provision: 75 foot minimum setback for structures; small number of exempted structures (piers, boat hoists, boathouses, open sided structures); allows setback averaging.

Proposed Provision: 75 foot minimum setback for structures; expanded exemptions for water-related purposes (fishing rafts, satellite dishes/antennas, utilities, flagpoles, water quality and habitat restoration structures). New setback reduction process allows properties with no compliant location due to a unique property feature to reduce setback to allow a 30 foot building envelope. Reduced setback cannot be smaller than 50 foot. Impervious surface and mitigation standards automatically apply because building will be closer than 75 foot. Setback averaging no longer allowed.

Public Comment:

- Support for long-standing, well-understood 75 foot setback.
- Issue with method of measuring setback: (1) call for allowing measurement to extend to the foundation w/exceptions rather than the overhang/eaves, but allowing counties to be more restrictive; (2) concern about influence of a wetland boundary pushing setback further back
- Boathouse issues: Whether new boathouses should be allowed in the buffer; if so, comments supporting 250 square foot size and other comments stating not big enough allowance. Concern boathouse issue too big to include in this revision and that should be removed and addressed through separate legislation
- New setback reduction process: Apply to existing structures proposing substantial changes and apply to commercial as well as residential. Concern that definition of "unique property features" uncertain. Call for more data on impacts on ability to build on lots. Support for clear, limited setback reduction circumstances
- Concern that setback be considered in land division review to avoid creating lots w/o legal building locations.
- Both a concern that existing setback averaging process will be compromised or discontinued and support for its elimination
- Concern that broad "structure" definition will lead to setback requirements being imposed on recreational equipment
- Clarify which "best management practices" employed for exempted utilities w/in the setback
- Concern that "exempted structures" too broad
- Concern that DNR-County OHWM location discrepancy resolution process is included in the code
- Call to differentiate between urban and rural setbacks: Concern that a 75 foot urban setback will counter planning efforts to control sprawl through increasing density.

Responses:

The comments convey a wide range of perspectives and recommendations. The proposal maintains a balance between protection and development. While the concept of different setbacks for different waterways is attractive, a general reduction of the setback below 75 feet is not consistent with scientific data questioning whether water quality remedies can be engineered in small spaces and there is no substitute is available for the waterfront space required for survival of shoreland wildlife species.

- Exemption language from setback averaging provision and list of more specific exemptions not included. The exemptions included in the section support other statutes or codes, except for the boathouse provision.
- The boathouse exemption was determined based on comments from the 2 public hearings and our decision to minimize overall impacts to the shoreland buffer area. Thus, any new boathouse must be located within the allotted area for the access and viewing corridor. Piers and boat hoists are placed below the OWHM so do not need to be exempted here.
- Research shows that the area 35 feet from the OWHM is a critical area for the public trust in the waterway and it was decided that setback averaging should not apply to construction in this area. Property owners will have to apply for a variance to build closer than 35 feet from the OWHM regardless of the existing development pattern. Provision that at no time may the setback be less than 35 feet from the OWHM was added to the setback averaging rules

Shoreland Vegetation and Buffers

Response: Change title of subsection to "Vegetation" to more accurately reflect the content of the section.

Purpose of section: This provision addresses the three major goals of shoreland management - water quality, fish and wildlife habitat and natural scenic beauty. The vegetation section has been updated to remove uncertainty and ensure protection of Wisconsin's waterways by controlling erosion and sedimentation and preserving the natural scenic qualities which provide vital habitat for shoreland wildlife.

Current Provision: Cutting of trees and shrubbery is regulated to protect natural beauty, control erosion and reduce the flow of effluents, sediments and nutrients from the shoreland area.

1. In the strip of land 35 feet wide inland from the ordinary high-water mark, no more than 30 feet in any 100 feet shall be clear-cut.
2. In shoreland areas more than 35 feet inland, trees and shrub cutting shall be governed by consideration of the effect on water quality and consideration of sound forestry practices and soil conservation practices.
3. The tree and shrubbery cutting regulations required by this paragraph shall not apply to the removal of dead, diseased or dying trees or shrubbery.

Proposed Provision:

Primary buffer – Property owners shall preserve or establish, and maintain a buffer of native shoreland vegetation in the area that extends 35 feet inland from the ordinary high-water mark under the following circumstances:

1. When a new principal structure is constructed
2. When required under NR 115.21 (mitigation)
3. When required by a county's ordinance

Secondary buffer – As a general requirement everywhere, property owners shall preserve or establish, and maintain, a secondary buffer of native or nonnative, non invasive, ground layer vegetation, and including trees and shrubs from the primary buffer to the structural setback for the same conditions as the primary buffer.

Viewing and access corridor – 40 feet or 30% (whichever is less) for the first 200 feet of frontage or 200 feet or 20% (whichever is less) for greater than 200 feet of frontage.

Exemptions – Specific exemptions are created for agricultural practices and farm drainage ditches, Forest management activities, natural areas management activities; dam, levee, utility and roadway maintenance and temporary access.

Public Comment:

- Opposed to mandatory vegetation buffer requirements for all new principal structures.
- Opposed to the reduction in access size for lots less than 100 feet of frontage.
- Tall grasses may increase health and safety risks.
- Conflict in Department regulations NR 115 requiring buffers and DNR forestry requiring clearing around structures for fire safety.
- 35 foot buffer is inadequate, support 50 foot buffer.
- Proposed rule should not preclude additional cutting if done in accordance with an approved forest management or shoreline vegetation management plan.
- There should be an emphasis on maintaining the 35-foot primary buffer with natural vegetation.
- The requirement for buffers provides excellent habitat, water quality protection and ensures improved waterfront aesthetics.
- This is one of the most important aspects of NR 115, and yet, the importance of vegetated buffers for stormwater infiltration, habitat and natural scenic beauty is assumed, but not described anywhere in the new code. Sections 1 (a) and (b) should be combined under an intent section and instead of referring to "sound forestry and soil conservation practices," require compliance with BMPs for shoreland areas established by the DNR Forestry Division.
- Support the 35 foot primary buffer to protect habitat, however, stronger reference to habitat is needed and more intent/purpose/direction language on vegetation management.
- Vegetation removal and management should be combined applying the same performance standards to both.

Responses:

- The goal is to not lose additional existing shoreland buffers and the hope is to gain more shoreland buffers through volunteer restorations or through mitigations. This proposal does not require any existing property owners to "stop mowing their lawns", but does clarify that preservation of existing buffers, except in the area of the access and viewing corridor, is critical to the health of the water body.
- A minimum 35 foot vegetation buffer size is maintained because smaller buffers don't offer adequate protection for water quality, wildlife habitat and natural scenic beauty. Riparian vegetation is the most critical ingredient of lake and river habitat. Although researchers have estimated that animal habitat can be affected up to 1,500 feet away from human activities and structures, it may be possible to limit the impact of these disturbances by preserving and restoring shoreland vegetation. Ninety-percent of rare species depend on the shoreland zone for all or part of their life cycle. Riparian habitat cannot be replaced anywhere other than at the lake or stream edge.
- References to primary and secondary buffers have not been included; concern existed that including that language would have created non-conforming buffers.
- An upper limit or cap on total width was needed to allow reasonable access but to reduce the impact on habitat, water quality, natural scenic beauty, etc. Access and viewing corridor width is capped at 200 feet for all properties.
- The new language attempts to further clarify what vegetation removal can be done, but any removed vegetation must be replaced with comparable native species in the same area.

Land disturbing construction activities

Purpose of section: Reduce sediment, nutrient and stormwater runoff impacts from construction immediately adjacent to lakes and streams

Current Provision: "Filling, grading, lagooning, dredging, ditching, and excavating may be permitted only in accordance with the provisions of sub. (2), the requirements of ch. 30, Stats., and other state and federal laws where applicable, and only done in a manner designed to minimize erosion, sedimentation, and impairment of fish and wildlife habitat."

Proposed Provision: Counties must establish a permit system to control erosion and sedimentation. Counties may choose to exempt projects with state permits under ch. 30 or NR 216. Counties may act as agent of DNR, using county permit to simultaneously grant state approval if MOA (memorandum of agreement) developed and approved.

Public Comment:

- General support for regulation: water quality protection; enables addressing of regional land differences (soils, slopes)
- Standard should include minimum (threshold) area, slope or other standards for land disturbing activities that require county permits and a standard for determining compliance (set performance standard similar to NR 151).
- Include language to enable counties to issue permits for those less than the minimum threshold mentioned above
- Counties should not be responsible for issuing separate permits (i.e. duplicative erosion control permit) for land disturbance. Suggest one comprehensive zoning permit for structure construction that includes erosion control. Exempt those subject to UDC permitting.
- Beyond ch. 30 and NR 216, counties should not be able to exempt under this standard
- Don't allow counties to exempt grading

Response:

Entire section not included in the code. The goals of the section are met by the Land division review section. And, the existing "*filling, grading, lagooning, dredging, ditching, and excavating*" language was not changed, except that a natural scenic beauty design requirement was added.

Impervious Surfaces

Purpose of section: Provide a minimum amount of area to preserve space for infiltrating runoff, for fish and wildlife habitat, and avoid complete predominance of artificial features.

Current Provision: Current rule contains no impervious surface provisions

Proposed Provision: For new development, if 10% of the area within 300 feet of the OHWM is covered by impervious surfaces mitigation is triggered; no more than 20% coverage is allowed. Existing development may have up to 15% impervious surface coverage before triggering mitigation and also may not have more than 20% coverage. No expansions are permitted in primary buffer or closer to the water if setback not met. Unlimited maintenance and repair is allowed without conditions.

Public Comment:

- Allow expansion of impervious surface in primary buffer in exchange for mitigation - prohibiting of expansion of impervious surface in primary buffer limits usability of home and value
- Impervious surface limits too restrictive
- Eliminate or modify impervious surface thresholds
 - Unclear what surfaces are included
 - Don't include public or private streets
 - Clarify that trigger and cap have an effect only when expanding – not automatic on exceedance
 - Total too small
 - Use other ways to manage runoff
- Keep impervious surface limits:
 - Caps already exceed scientifically determined threshold of ecological effect
 - 20% cap should be absolute
 - Apply caps to entire shoreland zone
- Allow counties the option of keeping the 50% rule

Response:

- Unlimited maintenance and repair will still be allowed without mitigation.
- The proposed code language tries to simplify the implementation and regulation of impervious surfaces. It now includes two provisions: 1) Lots with between 15% and 30% impervious surface cover in the shoreland zone must perform mitigation measures, and 2) No lot may exceed 30% impervious surface cover. Research has proven that this is a significant requirement to protect water quality.
- Only the impervious surface cover existing on a lot within the shoreland zone used for calculation.
- The section maintains that existing lots that exceed the impervious surface standards are not required to reduce their impervious surface cover to the 30% limit, nor are property owners required to do anything unless and until they propose to make changes to their property.
- Projects that exceed the impervious surface limit can still apply for variances.

Height Requirements

Purpose of section: To address the wildlife habitat and natural scenic beauty mandate of NR 115 this new standard limits the height of new development near the shore.

Current Provision: None

Proposed Provision: "To protect and preserve the wildlife habitat and natural scenic beauty of lake and riverine environments, after the effective date of this rule [revisor insert date], a county may not permit the construction or placement of a structure on a lot within 300 feet of the ordinary high-water mark of a lake or stream unless the structure height does not exceed 35 feet. A county may create specific standards for height that apply to zoning districts for commercial, agricultural or industrial development within the shoreland zone provided those standards are incorporated into the county's shoreland zoning ordinance."

Public Comment:

- Opposition to state defined height limit: Natural beauty should be county defined; Addressed case-by-case; Apply only to pristine waters not to urban and rural development; Limits size of waterfront home, thus its value
- Limit height to 26' (two stories)
- No exception for commercial, agricultural, industrial, or *multi-family*/condominiums (exempt silos, farm buildings, smokestacks)
- Concern about point or vantage point from which 35' would be measured
- Would like this to include cellular towers
- Would like religious buildings (i.e. steeples) to be excluded
- Concern that counties won't have resources to enforce

Response:

- The height section does not allow the construction or placement of a structure on a lot within 75 feet of the OHWM unless the structure height does not exceed 35 feet.
- Counties requested flexibility to be able to address issues described in the public comment section and this proposal allows that flexibility. Not defining a vantage point from which to measure height will allow counties with existing height limits to maintain their measurement methods.

Nonconformities

Purpose: To establish regulations and to bring about the conformity of existing nonconforming structures in the shoreland zone.

Current Provision: Routine maintenance and continued lawful use permitted of a building, structure or property existing at time of ordinance adoption. Alteration, addition or repair over the life of the structure may not exceed 50% of the equalized assessed value of the structure or building. Discontinued use of such a property for more than 12 months must come into conformity.

Public Comment: None

Response:

- Did not remove the nonconforming section as was proposed in the previous versions that went to public hearing. In order to simplify implementation of the code and based on the fact that the courts have issued several decisions that separate use and area variances, this section is proposed to remain in the code.
- The 50% rule language has been removed from the non-conforming use section.
- The previous code language used "use" and "area" standards interchangeably but recent court decisions have described different standards for these two variance types.
- This section also establishes minimum standards that should be easier to implement than the 50% rule. Now a county permit with a number of requirements must be issued in order to expand or relocate a nonconforming structure. This change acknowledges that very few nonconforming structures have been relocated under the current rule because numerous variances have been granted for projects like this. The goal of this change is to offset some of the impacts but require fewer variances.

Mitigation

Purpose of section: Mitigation is used to allow more development flexibility while continuing to achieve statutory objectives.

Current Provision: There is no mitigation in the current administrative code. Variances are the only relief mechanism. Mitigation is statutorily required in for gazebos and similar 200 square foot structures less than 75 feet from the water [s. 59.692(1)(v)].

Proposed Provision: The proposal provides choices among mitigation measures when dimensional standards are exceeded. The mitigation standards are performance based and in proportion to the amount by which the dimensional standard is exceeded.

Public Comment:

General support for the concept of mitigation with several concerns:

- Uncertainty of what will be required to meet the standards.
- A restored or protected shoreland buffer should meet the entire mitigation requirement.
- Structural expansions should not trigger mitigation.
- Expense of possible mitigation practices.
- Mitigation should be required for all projects that exceed dimensional standards

Response:

The mitigation section was not included in this proposal; however, the mitigation definition was added. And, mitigation is required when impervious surface cover in the shoreland zone is increased so that total will be between 15% to 30% of the total shoreland cover, as well as being one of a number of requirements for the issuance of a permit to expand or relocate a nonconforming structure. This approach will allow counties more flexibility in how they choose to implement mitigation.

In the absence of a mitigation system, the result of unlimited modification of the shoreland zone would be increased public costs for treatment of nuisance levels of algae and aquatic plants, lake and stream restorations and reduced local revenues from visitors and lower property values.

Outside of the code, the Department will offer support to counties in developing mitigation options.

- Counties will be able to adopt the requirement of a full vegetation buffer restoration into their ordinances to satisfy mitigation. A naturally vegetated, functioning buffer will meet the protection goals of the code.
- The Department has developed a computer program that will help counties conclude whether mitigation measures meet the code-requirements.
- A number of counties have mitigation systems adopted into their ordinances. Pending Departmental review and approval, those systems may remain in use.

Land Division Review

Purpose of section: Provide an administrative mechanism to implement standards that manage density of structures to preserve space for infiltrating runoff, for fish and wildlife habitat, and avoiding a predominance of artificial features.

Current Provision: Review of 3 or more parcels of 5 acres each within 5 year period for factors including conformity to code provisions

Proposed Provision: Must review creation of one or more lots 5 acres or smaller; must comply with lot size requirements and consider same factors as in current. Addresses lots divided by streams so that they may exist but requires that one side of stream have compliant building location

Public Comment:

- Retain current level of review to avoid increased local workload
- Factors for review beyond scope of shoreland zoning and are vague
- Should apply to lots created after date of ordinance
- Applies to lots that do not abut waterways

Response:

The changes to the Land division review section presented at the public hearings were not included. The existing code language has been successfully interpreted and implemented by all counties. Natural scenic beauty is a protected public trust use as determined by the Wisconsin Supreme Court. No change to the existing land division review language. Counties can be more restrictive at their own discretion.

Adoption of administrative and enforcement provisions

Purpose of section: Establish requirement for base level of operations and procedures essential to ensure meeting of minimum statewide standards to protect habitat, water quality and natural scenic beauty for users. Current rule includes many specific administrative requirements because it was adopted when many Wisconsin counties had no zoning provisions and general zoning law was not as well developed as it is today.

Current Provision: Current rule requires a variety of procedural and administrative measures.

Proposed Provision: No change from current rule

Public Comment:

Inspection, permit requirement and other administrative requirements increase workload for local governments.

Response: In the interest of minimizing the revisions, this proposal retains the original code language. One provision was added. In addition to notifying the Regional office prior to the following, counties must also submit to the Department within 10 days permits to relocate or expand nonconforming principle structures; variances, special exception and conditional use permits; appeals for map or text interpretations and decisions to amend map or text ordinances.

Department Duties

Purpose of section: The section describes tasks required of the department in order to set and maintain minimum statewide standards and to assist local governments in effective administration of ordinances.

Current Provision: The rule requires a handful of basic tasks.

Proposed Provision: The proposed rule requires additional specific activities, including a model ordinance and mitigation design tool, in addition to existing required Department activities.

Public Comment: No comments.

Response:

In order to clarify the code amendment process that is already in place, this proposal requires that the Department shall issue a certificate of compliance stating the county shoreland ordinance complies with s. 59.692, Stats.

And, a time limit of 180 days was included in the provision requiring a non-compliant county to work with the Department to develop and adopt a compliant shoreland ordinance. The existing code does not include a time limit.

Note that in addition to duties specified by rule, the Department:

- Contracts annually with the UW-Extension's Center for Land Use Education for services to local zoning programs including training and handbooks, and
- Assigns specific statewide and regional staff to work closely with zoning offices and the Wisconsin County Code Administrators and similar groups to provide technical assistance and oversight under the current code, investing an average of \$268,551 and more than 15,000 hours of staff time annually on shoreland zoning.

Cost of county administration

Purpose of section: Not a section of the code. There were a number of miscellaneous comments concerning the potential cost counties might incur implementing and enforcing the proposed code.

Current Provision: No language in the current rule on this issue.

Proposed Provision: No language proposed.

Public Comment:

- Counties do not have staff and funding required for adopting and administering new rule requirements.
- Oppose adoption until state funds are provided.

Response:

With the exception of Milwaukee and Menomonee Counties, all counties currently administer shoreland ordinances. Ordinance development and adoption are eligible for DNR Lake and River grants of \$10,000 to \$50,000 available on an annual basis. In the past, many counties have taken advantage of available grants to revise ordinances and improve administrative practices.

By rule the Department cannot provide or require funding or specific commitments of funds. However, the Department may be able to set priorities for its existing grant programs (see above) to fund ordinance adoption during the two-year adoption period and develop model grant proposals for ordinance adoption. Another possibility is for the Department to help develop and support legislative change to allow pass-through of state fees when local governments administer state requirements. And, whenever budget conditions allow, the Department might be able to support appropriate state investment in local shoreland zoning activities.

Additionally, the changes to the Administrative and enforcement provisions create more flexibility and may reduce county costs—less strict inspection schedule, county determined unincorporated areas-outreach plan, various methods for recording proceedings and removal of permit application site diagram review requirement. Some of the Department duties reduce local costs, such as providing a model ordinance, availability of the mitigation computer program and initial and ongoing training for local governments. And, an overall effort has been made to minimize the changes that will require massive ordinance amendments and additional staff workload.

Property rights and property values

Current Provision: Current rule caps modification of and structural repairs to nonconforming uses, which greatly constrains what owners can do on their shoreland properties. Although no section in the code explicitly deals with these issues, there were a number of miscellaneous comments claiming the revised rules will constitute a violation of private property rights and will constrain property values.

Proposed Provision: The proposed rule helps maintain property values by allowing much more maintenance, expansion and modification than the current rules. Greater flexibility is given to property owners, although there are constraints that require owners to make decisions about how extensively they will develop their shoreland property.

Public Comment:

- Property rights are given up through ordinance controlled building sites
- Property values will go down if constraints are placed on building

Response:

No change to provisions. Studies show that property values do not decrease in response to zoning ordinances and in many cases continue to increase under more restrictive zoning provisions. Searches revealed no data showing that property values have decreased as a result of the adoption of zoning standards.

Data from Wisconsin and across the nation demonstrate that water quality, fish and wildlife, and natural scenic beauty have a quantifiable positive effect on property values and recreation-based economic sectors:

- Shoreline frontage values in Vilas and Oneida counties increased an average of 7% to 12% when towns had zoning requirements with a minimum 200 feet of water frontage for lots, according to a University of Wisconsin study based on data collected on 892 vacant lakefront properties from 1986-1995. The study indicated that the zoning requirement, by preserving clean water, natural scenic beauty and peace and quiet, generated an economic gain that more than offset the economic loss resulting from the constraints on development.
- Housing prices were 32% higher if they were located next to a greenbelt buffer in Colorado. Nationally, buffers were thought to have a positive or neutral impact on adjacent property values in 32 of 39 communities surveyed.
- A California study found homes near stream restoration projects had a 3% to 13% higher property value than similar homes along un-restored streams. Most of the perceived value of the restored stream was due to the enhanced buffer, habitat, and recreation afforded by the restoration.
- The loss of property value due to lake water clarity declining below the regional average was estimated to be \$256 to \$512 million for 191 Maine lakes, a University of Maine study. The same study was used to determine potential future tax losses in one Maine Township where 60% of the 211 million property tax valuation is from lakefront property. A 3-foot decline in average minimum water clarity would cause a loss of \$10.5 million, roughly 5% in total property value.

Local and state economies are affected by water quality, fish and wildlife and natural scenic beauty, as demonstrated by studies in Wisconsin and elsewhere. The following data show that the presence of water resources of good quality contribute positively to local economic activity:

- Scenic beauty and relaxation were the top reasons tourists gave for visiting Wisconsin and spending \$11.4 billion in the state in 2001. Tourism supported 380,000 full-time jobs and generated nearly \$1.8 billion in revenues for state and local governments.
- Without state and local revenues yielded from travel expenditures, each household would have to pay an additional \$932 in taxes to maintain existing services.
- Each year more than 1.5 million anglers spend 17 million days fishing in Wisconsin. They spend \$1.1 billion directly on fishing related expenses which generates more than \$2.1 billion in economic activity.
- Sport-fishing supports 30,000 jobs and generates more than \$75 million in tax revenues for the state for use on critical services like education and health care.

- 400 Wisconsin business executives surveyed in 2000 gave Wisconsin its highest rankings relative to other states for its quality of life, government services, and loyalty to area. Availability and quality of water were the highest ranked quality of life topics.

Searching revealed no data showing that tax revenues or jobs are negatively affected by zoning limitations.

Private property rights are fundamental to American society and are recognized in the proposed rule (e.g., provisions increasing flexibility for continued use of existing buildings and substandard lots; proposed standards do not strictly adhere to scientific thresholds for water quality or habitat impacts). Socially and legally, the right to use property is not so absolute that it allows the right to harm others (*Just v. Marinette*, 1972). With the importance of water resources to Wisconsin's economy and culture, the state's Constitution, legislative, judicial and administrative systems treat lakes and streams as if they are owned by all, seeks to maximize the benefits for all (*Hixon v. PSC*).

The changes in this proposal are made in part in response to the number of variances that are being applied for and issued. This proposal may allow the expansion or reconstruction of non-conforming structures, but will also protect the public trust and thus protect property values.

Cost to Property Owner

Current Provision: No language in the current rule on this issue.

Proposed Provision: No language proposed.

Public Comment:

Concern expressed that code compliance will increase costs for property owners to develop or improve their waterfront properties.

Response:

No changes made to the proposed code. The revision, while it offers more flexibility than current law, will result in waterfront property owners having to make calculated decisions when considering improving or making changes on their lots. Therefore, costs will differ for each property owner based on their individual goals for their property and adjacent water body. In most cases, costs will not change from the cost of implementing the current code; permits will still be part of the equation and there are a variety of decisions one can make to vary costs.

Property owners may incur costs to mitigate, but only when they choose to modify buildings or surfaces in ways that exceed dimensional standards. The flexibility built into the code offers choices among mitigation practices that might range from zero cost, do-it-yourself measures to moderate cost landscaping. Rain gardens, a common mitigation measure for single-family residential lots cost between \$3.00 to \$5.00 per square foot if using purchased plants and volunteer labor and \$10.00 to \$12.00 per square foot if completed by a landscaper according to the publication Rain Gardens-A How to Manual for Homeowners (publication WT-776 2003, UW-Extension and Wisconsin).

In some cases, mitigation measures may save money for property owners. Corporate landowners can save between \$270 to \$640 per acre in annual mowing and maintenance costs when they keep open lands as a natural buffer instead of replacing it with turf. No engineering or other professional measurement, calculation or drawing is required to select or design mitigation measures, unless a property owner chooses to retain professional services. The Department will provide a computer-based mitigation design tool to provide specifications and instructions for mitigation measures for counties do not already have them or choose to develop their own. The tool requires that a property owner supply information about their lot (size, soil type, slope), impervious areas (how many, size, distance from water), and vegetation (ground cover, tree canopy) to receive alternative mitigation measures and instructions.

General Support

Public Comment:

- Widespread support in 2005 (in favor 38,185, opposed 11,369, neutral 1104)
- Substantial support in 2007 (favor 1438, too permissive 918, support and opposed parts 383, neutral 111)
- Current rule is out-of-date
- Proposed rule is a substantial improvement
- Rule not protective enough
- Adhere to scientific parameters
- Regulations necessary to prevent pollution, to protect wildlife habitat and ground water
- Revisions follow proactive counties
- Provides platform and opportunities for partnerships.

Response:

Substantive comments on specific provisions not offered here, thus rule will be promulgated with the modifications discussed in provision sections above. In 2005, three times as many comments indicated support over dissent or neutrality. Fewer comments were submitted in support of the 2007 revisions, with fewer total comments overall: approximately 50,000 in 2005 and 8900 in 2007. Wisconsin statutes require the Department to set minimum statewide standards to protect water quality, fish and wildlife habitat and natural scenic beauty (s. 281.35, Wis. Stats.). While some supporters prefer more restrictive standards or explicit adherence to scientifically derived parameters (e.g., impervious surface), the rule follows the scientific direction while, as a matter of equity, recognizing and not seeking to reverse the current level of development along Wisconsin's lakes and streams.

General Opposition**Public Comment:**

- Not protective enough
- Greater opposition to revision than support (rule comments opposed 5923, support and opposed parts 383, in favor 1438, too permissive 918, neutral 111)
- Oppose wrapping currently unregulated items into code: camping trailers, fences, patios, retaining walls, driveways, sidewalks [NOTE: These structures— camping trailers, fences, patios, retaining walls, driveways, sidewalks— actually are currently regulated.]
- Concern regarding nature of the data/scientific literature: improved water quality claims and whether studies cited are peer reviewed, controlled, published, verified
- Perception of inconsistencies between what is required of small time shoreland owners and the "more powerful", such as airports, wealthy shoreland owners, certain DNR/government programs, other land-uses beyond shoreland in watershed
- Concern that this perceived one-size-fits-all-approach won't work statewide
- Too complex

Response:

Substantive comments on specific provisions not offered here, thus rule will be promulgated with the modifications discussed in provision sections above. Commenters opposed the revision claiming it does not offer enough shoreline protection, while others oppose its restrictiveness. Some oppose the concept of regulating shoreland development altogether. However, the department has a statutory requirement to set minimum statewide shoreland zoning standards that meet standards set by the legislature. Modern, sustainability-focused landscape practices would better meet the statutory objectives while providing additional landowner flexibility and so the Department has an affirmative duty to complete updating this rule.

ATTACHMENT 2

RESPONSE TO 2005 PUBLIC COMMENTS Proposed Revisions to NR 115, Wisconsin Administrative Code Statewide Minimum Shoreland Zoning Standards

This document is a summary of the approximately 50,658 comments from nearly 12,000 individuals which were received during the public comment period in the summer of 2005. This summary does not contain each individual comment received. For information from the complete comment database please contact Gregg Breese at Gregory.breese@wisconsin.gov or (608) 261-6430.

DEFINITIONS AND APPLICABILITY

1. Structure - 300 comments requesting changes in the definition. Too broad, overly encompassing and confusing.
2. Ordinary maintenance and repair – 73 comments requesting clarification in definition
3. Structural repair – 72 comments requesting clarification in definition
4. Shoreland wetland zoning – 22 comments indicate wetland definition is confusing and request clarification on permitted uses – can they only be allowed with a permit?
5. Native vegetation – 8 comments requested a definition for native vegetation
6. Back lot – 8 comments requested a definition for back lot
7. Access lot – 8 comments requested a definition of access lot or keyhole development
8. Campgrounds – 16 comments stating the definition of campsite, non-permanent, camping unit and residence need clarification. In addition, expansion principles and lot sizes are not appropriate.
9. Additional definitions requested include: basal area, boathouse, parcel, common ownership, substandard lot, applicable standards, unstable or steep conditions, administrative permit, accessory uses, out lot, best management practices and ground layer vegetation.
10. Comments suggested modifications to the following definitions: mobile home park, gravel, natural areas management activity, residence, mitigation, shoreland zone, impervious surface, open fence, replacement, vegetative buffer, lot, shoreland frontage and land disturbing activities (should be consistent with NR 151)

SETBACKS

11 Specific Opposition Issues

1. Measuring setbacks - NR 115.13(1)(b) – 159 comments indicated the retroactive effective date will cause problems and may make a number of structures nonconforming
2. Permit required - NR 115.13(2) – 154 comments indicated this provision will require property owners to obtain another permit, pay another fee and could prolong the development approval process
3. One stairway per 100 feet of frontage - NR 115.13(4)(b) 154 comments indicated that this should only apply to new lots and that replacing walkways in order to reduce stormwater runoff could be very expensive
4. Signs and flagpoles - NR115.13(4)(c) – 586 comments opposed to this provision is unnecessary and difficult to enforce
5. Significant on-going erosion – NR 15.13(4)(f) - 153 comments opposed to demonstrating on-going erosion for erosion control structures
6. Steps and landings – NR 115.13(4)(n) – 562 comments indicating size limitations are a clear safety issue
7. Boathouses meeting 75 foot setback – 221 comments indicated this provision would be problematic
8. Accessory structure regulation – 212 comments indicated regulation too strict
9. Prohibiting storage of a boat or ice shanty within 75 feet – 218 comments indicated regulation too strict
10. Definition of OHWM for Lake Michigan and Lake Superior – 43 comments indicated that the current definition is not appropriate to measure setbacks on the Great Lakes

11. Setback averaging – 422 comments requested modifications to this provision ranging from allowing averaging for a garage and vacant lots to be utilized in the averaging calculation

2 Specific Issues of Support

1. Greater setback – 20 comments indicated a need to work towards the 75 foot setback and no less and setbacks suggested of 90 and 100 feet
2. Wetland setback – 20 comments indicated that a 10 to 75 foot wetland setback or buffer should be included in NR 115
3. Exempted structures – 11 comments regarding the regulation to be too permissive
4. OHWM and wetland determinations – 4 comments concerned with the regulation potentially allowing a structure closer than 75 feet

General Comments: 74 generally opposed each with minimal mention, 12 neutral, 18 specifically support and 53 comments support but stated regulation was too permissive.

Of special note – out of the 1,227 comments received in the setback section, only 2 comments were opposed to the 75 foot setback because it was too restrictive.

LAND DIVISION

2 Specific Opposition Issues

1. Division of land – create or reconfigure language – 154 comments indicated this provision would add additional regulatory and oversight burdens to already financially strapped county zoning administrations and staff
2. Substandard lots in common ownership – 158 comments indicated that counties currently have the authority to regulate these lots, therefore, the regulation is unnecessary

Additional Comments

1. Reflect standards in section 236.45 Wisconsin Statutes – 4 comments felt consistency with NR 115 and plat review statute was important
2. NR 115.09(2) – 4 comments indicate that the use of the word reconfigure in this section is confusing
3. Streams bisecting properties – 3 comments confused by regulation

General Comments: 9 generally opposed, 8 neutral, 4 specifically support and 5 comments support but stated regulation was too permissive.

LOT SIZE

4 Specific Issues of Support

1. Minimum lot sizes – 9042 comments indicated that lot sizes should be 20,000 square feet with a width of 150 feet or more regardless of sewer
2. Multi-family – 40 comments indicated multi-family development should be required to meet the same lot size and density standards as single family development
3. Access lots – 14 comments indicated that access lots should have the same requirements for size, buffers, width, etc as other lots
4. Keyhole development – 9 comments indicated no keyhole development allowed and 10 comments indicated if key holing is allowed, the lots should meet the same requirements as a residential lot

4 Specific Opposition Issues

1. Multi-family – 243 comments indicate the lot sizes for multi-family development are too large and will make condo developments prohibitively expensive
2. Lot widths – 644 comments indicated that the new mechanism for measuring lot widths would result in new nonconformities
3. Back lots – 89 comments indicate that this regulation is unnecessary in this rule
4. Access lots (keyhole development) – 89 comments indicate that giving counties this flexibility may have a significant adverse impact on the value and usability of lots

Additional Comments

1. Campgrounds – 17 comments indicate more clarity or flexibility is necessary in the lot size section for campgrounds
2. Other lot size suggestions – no less than 40,000 sq. ft., 43,000 sq. ft with 150 ft. of frontage and a 300 ft. depth, 43,560 sq. ft.,
3. Minimum lot sizes – 8 comments indicate that 7,000 sq. ft. for a single family dwelling is too large – other options include 6,000 and 5,000 sq. ft.

General Comments: 43 generally opposed, 15 neutral, 5 specifically support and 35 comments support but stated regulation was too permissive.

VEGETATIVE BUFFERS

7 Specific Issues of Support

1. Primary buffer – 9015 comments indicated that the primary buffer should be increased to 50 feet or more
2. Primary buffer – 11 comments indicated that the primary buffer should be increased to 75 feet or more
3. Wetland buffer – 9,035 comments indicated that wetland buffer standards should be required in NR 115
4. Vegetation plans – 15 comments indicated strong support for vegetation plans
5. Lawns – 10 comments indicated that existing lawns should be replaced with natural vegetation within the primary buffer
6. Native vegetation – 13 comments indicated that the final rule should require a diversity of native vegetation in the primary buffer
7. Access corridor – 7 comments stated the corridor requirements were too large and fragmented habitat. One access corridor is sufficient regardless of the frontage.

5 Specific Opposition Issues

1. Vegetation plans – 619 comments indicated that this requirement will add increased costs and could unreasonably delay the construction process. Counties do not have the staff or expertise to properly review such plans
2. Multi-unit development plans – 155 comments indicated the new formula will create more nonconforming projects and the costs for development and implementation would be significant and ongoing
3. Access Corridor – 162 comments indicated that the size limitations on access corridors is too small for smaller lots
4. Primary buffer – 7 comments specifically objected to establishing vegetation in the primary buffer

Additional Comments

1. Ban on fertilizer – 2 comments indicated a desire to ban the use of any fertilizer within the 75 foot setback area
2. Rivers – 32 comments indicated that rivers should be treated differently than lakes with regards to the vegetative buffer requirements. Buffer requirement is not appropriate for small lots on rivers.
3. Administration and Enforcement – 7 comments indicated that the vegetative provisions would be difficult to administer and enforce due to county staffing and expertise
4. Flexibility – 6 comments indicated that the counties need more flexibility in this area
5. Primary buffer – 10 comments indicated that all property owners should be required to maintain or replace vegetative buffers and that all properties should have the same buffer requirements
6. Nuisance – 15 comments indicated that vegetative buffers will increase undesirable species such as mosquitoes, snakes and other insects and pests.

General Comments – 19 comments are general housekeeping items, 17 generally opposed, 3 neutral and 16 comments support but stated regulation was too permissive.

IMPERVIOUS SURFACES

3 Specific Issues of Support

1. Limit – 9,041 comments indicated that impervious surfaces should be limited to 20% of the lot
2. Limit – 19 comments indicated that impervious surfaces should be limited to 10-15% of the lot – some said within 200-300 feet of the OHWM
3. Cap – 10 comments indicated that there should be a cap on the amount of impervious surfaces regardless of the type of development
4. More protective – 7 comments indicated that the regulations are necessary but the section is too permissive (did not provide an alternative)

3 Specific Opposition Issues

1. Limit – 385 comments were in opposition to a statewide impervious surface standard and the trigger for re-vegetation
2. Limit – 173 comments indicated that impervious surface limits will place unreasonable limit on the size of homes on and near waterfront property
3. Zero increase – 92 comments indicated that this stormwater runoff standard will cost homeowners thousands of dollars

Additional Comments

1. Best management practices – 6 comments supported implementation and maintenance of BMPs and cautioned the need for appropriate minimum standards of BMPs to gauge effectiveness
2. Definitions – 24 comments on the need for greater clarification for definition of impervious surface
3. Runoff – 3 comments indicated that consideration should be made as to whether the surfaces contribute to runoff
4. Small lots – 6 comments indicated that smaller lot sizes and river lots need to be taken into consideration
5. Trigger – 2 comments indicated that the trigger for mitigation should be reduced to 15% impervious cover
6. Primary buffer – 3 comments indicated that no new impervious surfaces should be allowed within 35 feet
7. Others: Different slopes should have different standards, regulations should distinguish between rater and volume of discharge, concerned about time delays of permits for this section

LAND DISTURBANCES

3 Specific Issues of Support

1. Activities – 11 comments indicated that no land disturbing activities near the water or wetlands should never be approved
2. Plans – 5 comments indicate that the need for erosion control and vegetation plans is strongly supported, but would favor firmer restrictions
3. Slopes – 4 comments indicated that filling and grading activities should be restricted on steep slopes

3 Specific Opposition Issues

1. Erosion control and vegetation plans – 153 comments indicated that this provision could be very expensive
2. Application – 3 comments indicated that this provision should only apply to riparian lots and not the entire shoreland zone
3. Conservation – 4 comments indicated that vegetative buffers, in some cases, can create a shoreland unfit for sound conservation practices

Additional Comments

1. Permits and exemptions – 13 comments pertained to requiring too many permits, not exempting enough structures or exempting too many structures
2. Other activities – 4 comments indicated that soil compaction and tree damage are associated with land disturbing activities and are not accounted for in this section

3. Staffing – 3 comments indicated that the staff requirements would be excessive therefore making the provision difficult to enforce and monitor erosion control and vegetation plans
4. Flexibility – one comment offered the suggestion to allow minimal land disturbing activities without triggering an erosion control or vegetation plan.

NONCONFORMING STRUCTURES AND USES

5 Specific Issues of Support

1. Maintenance and Repair – 500 comments indicated that NR 115.21(4)(a) and (b), the allowance of ordinary maintenance and repair, is a good change
2. Replacement – 395 comments indicated that NR 115.21(4)(d), allowing replacement of some nonconforming structures, will greatly benefit property owners by protecting investments in their homes
3. Replacement and expansion – 41 comments indicated that NC principal structures should not be allowed to be replaced or expanded if there is a legal building site on the lot
4. 50% rule – 14 comments indicated that counties need more than the 50% rule to regulate proposed changes to principal structures
5. Appendix A – 11 comments indicated that appendix A is problematic because the maximum footprints were too large considering people can easily build up to three stories. There should be a 1,200 to 1,500 sq. ft. maximum

9 Specific Opposition Issues

1. Boathouses – 222 comments indicated that prohibiting the alteration or replacement of a boathouse foundation unless moved to a compliant location is problematic
2. NC use provision – 154 comments indicated that this prohibition exceeds the DNR's authority and the statutory protections afforded to property owners under the 50% rule
3. NC accessory structures – 154 comments indicated that the prohibition on structural alteration unless mitigation is implemented is more onerous than the current 50% rule
4. Structural alteration – 154 comments indicated the prohibition on structural alteration for principal structures unless mitigation is implemented is more onerous than the current 50% rule
5. Expansion – 154 comments indicated that the proposed footprint maximums for structures between 35 and 75 ft will severely restrict the size of expansions allowed for NC structures
6. Straddling – 155 comments indicated the need to allow more expansion beyond the 75 foot setback
7. Minimum lot size – 568 comments indicated that the minimum lot size of 7,000 sq. ft. for expansion and replacement is both arbitrary and unfair
8. Campground expansions – 843 comments indicated that only the portion of the campground being expanded should have to come into compliance with the revised NR 115.
9. Camping units – 836 comments indicated that camping units within the shoreland zone should be able to be expanded to industry specific sizes essentially replacing and existing unit

Additional Comments

1. Additional provisions – 11 comments indicated that there should be provisions for distinguishing between NC uses, structures and substandard lots and standards applicable to each circumstance
2. Organization – 8 comments indicated that this section of the code needs to be clearer. As written it is difficult to follow and could be left to interpretation, therefore, making it difficult to enforce
3. Local control – 6 comments indicated that local government should decide regulations for NC structures
4. Improvement – 4 comments indicated that in relation to NC structures, the revised code is a significant improvement over the existing NR 115 provision

Points to Ponder

- Footprint expansion limited to one-time per property, not per owner
- Could the DNR provide incentives for the removal of nonconforming structures
- Minimum size to expand should be defined by the minimum principal structure size of the zoning district where the structure resides

- It is better to apply the foundation restriction only to those accessory structures that are buildings
- The rule is unclear as to whether a landowner can elect to not replace portions of the original structure closest to the water to gain additional square footage for expansion
- Minimum lot size for expansion and replacement should be 6,500 sq. ft. consistent with the model ordinance

General Comments: 33 generally opposed, 11 neutral, 11 specifically support and 25 comments support but stated regulation was too permissive

MITIGATION

2 Specific Issues of Support

1. Septic system – 171 comments indicated that inspection and upgrading of septic systems is a good definitive mitigation standard
2. Recording – 10 comments indicated that mitigation should be contractual

3 Specific Opposition Issues

1. Mitigation – 257 comments indicated that the requirement is expensive, unfair, too subjective and will create uncertainty among property owners
2. General – 212 comments indicated that the mitigation requirements are too prescriptive and they remove local governments' ability to apply standards appropriate to local conditions
3. Recording – 7 comments indicated that recoding and monitoring of shoreland buffer restorations would be difficult

Additional Comments

1. Technical standards are needed for mitigation and the public needs easy access to them
2. Counties should be provided with state funding for additional staff needed to implement the new rules
3. The concept of mitigation should be evaluated to see if results are in the public's benefit
4. Preservation and maintenance is subjective and will cause confusion
5. Buffer mitigation will never compensate for buffer area reduction and increased development density
6. Erosion control, conservation, safety and health should become the crucial factual determination in any mitigating standard
7. Mitigation should only apply to riparian lots
8. Specify that the cost of mitigation cannot exceed a specified fraction (5%) of the overall cost of the project

General Comments: 16 generally opposed, 5 neutral, 9 specifically support and 6 comments support but stated regulation was too permissive.